Notes

VALIDITY OF ALLOTMENT ORDER UNDER LUMBER CODE; SUSPENSION OF PENAL PROVISIONS AS TO LITIGANT CHALLENGING ORDER

A TEMPORARY allotment order was issued under the N. R. A. Lumber Code, limiting each of the 480 mills in the West Coast Division to a 30 hour operating week.[1] The mills operating one shift were thus restricted to 60% of capacity, but production in the 67 mills employing two shifts was reduced to 30% of potential capacity. The Recovery Act imposes a $500 per day penalty for each violation of a code provision, and the Lumber Code further provides that should any person exceed his allotment the offender's subsequent allotments shall be diminished by an amount equal to such excess. Complainant, owner of a two shift mill, appealed to the code administration for modification of the order, and upon failure to obtain relief brought suit in the federal District Court to enjoin the Lumber Code agencies[2] from enforcing the allotment and imposing the penalties. The order was claimed to effect an arbitrary discrimination against mills operating two shifts and to deprive them of property without due process of law; the penalties accumulating during suit were challenged as an excessive burden on the right to test the validity of the order. A temporary injunction was granted as requested, but upon further hearing was dissolved in so far as it restrained enforcement of the allotment provisions. The order was considered the most equitable distribution of employment and profits that could be devised in the almost bankrupt industry.[3] But the court questioned the validity of penalizing complainant so severely for bringing suit, and continued the order restraining the Lumber Code agencies from enforcing such penalties[4] pending further investigation of their constitutionality.[5]

The decision that the allotment order does not violate due process can hardly be questioned. The purpose of the Recovery Act is, so far as possible, to "overcome unemployment and disorganization of industry."[6] Greater sacrifices are, perhaps, required of complainant than of one shift mill owners,[7] but to favor two shift mills because of past production history and larger capacity would require greater limitation in operating time of other mills and thus destroy uniformity of employment and opportunity for profits within the industry as a whole. The allotment is not unconstitu-

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1. Issued August 30, 1933 for the period September 4, 1933 to September 30, 1933.

2. The members of the divisional code administration and the federal district attorney.

3. In 1933 one-half of the normal manufacturing capacity was idle, and one-third of the sawmill companies were in the process of liquidation or under the control of receivers or trustees. Employment dropped from 95,000 in 1929 to 30,100 in 1933; daily wages fell 62.1% from 1926 levels. (Figures taken from the instant decision, *infra* note 5.)

4. The restraint on specific penalties, however, still permits the government to enforce the allotment through the injunctive clause of the Recovery Act. P. L. No. 67, 73d Cong., 1st Sess. (1933) § 3 (c).

5. Willamette Valley Lumber Co. v. Watzek, U. S. Law Week, Feb. 6, 1934, at 39 (D Ore. 1934). No claim was made that control of production was in itself unconstitutional; this point was therefore not discussed.

6. Quoted from the instant decision, *supra* note 5. This factor should weigh heavily in determining the validity of the order. *Cf.* Stafford v. Wallace, 258 U. S. 495, 513 (1922).

7. Special equipment may be essential to two-shift production.

tional merely because complainant receives less benefits from the order than do others. Assessments of railway property for civic improvements are not invalid although they benefit the railroad comparatively little,[8] and contributions to a bank deposit guaranty fund may be demanded of conservatively run banks even though the chief beneficiaries of such a fund are institutions more speculatively managed.[9] Nor do the greater sacrifices required of the two shift mills constitute the order a violation of the Fifth Amendment. A flat 10% reduction of insurance rates, regardless of the varying earning capacities of the companies concerned has been declared constitutional;[10] a requirement that persons drilling for oil must secure a surety company bond has been approved despite the fact that the expense involved was prohibitory to some and not to others.[11] The due process clause, as a general rule, will protect property from confiscation;[12] beyond this, however, sharp discriminations are permissible if made in the public interest. In rate regulation, for example, the federal government must allow the railroads a "non-confiscatory" return,[13] yet the surplus may be expropriated for the purpose of loaning or giving it to weaker roads;[14] zoning ordinances have been approved which destroyed half the value of land,[15] although complete condemnation would necessitate compensation; and use of the taxing power has been permitted arbitrarily to impose uniform production on salmon canneries, regardless of past or present production capacity, so long as profit was still possible.[16] Applying this rule to the instant case, it appears that the allotment order does not violate due process, for it permits complainant to operate with some, though lessened profits,[17] and is discriminatory if at all[18] in the furtherance of public welfare. The familiar doctrine that

8. Davidson v. New Orleans, 96 U. S. 97 (1877); Branson v. Bush, 251 U. S. 182 (1919). Plaintiff claims due process as found in the Fifth Amendment is violated. Decisions interpreting the same clause in the Fourteenth Amendment are in point, as the restraint imposed on legislation in each is the same. Heiner v. Donnan, 285 U. S. 312, 326 (1932).

9. Noble State Bank v. Haskell, 219 U. S. 104 (1911).

10. Aetna Insurance Co. v. Hyde, 275 U. S. 440 (1928). A rate which prevents a utility from undercutting a popular competitor to the disadvantage of the less patronized company is valid. Public Service Commission v. Great Northern Utilities Co., 289 U. S. 130 (1933).

11. Gant v. Oklahoma City, 289 U. S. 98 (1933).

12. Special circumstances permit indirect confiscation, as when property is used for anti-social purposes. Mugler v. Kansas, 123 U. S. 623 (1887).

13. A "non-confiscatory return" guaranteed by due process is not necessarily a commercially profitable one. See Columbus Gas and Fuel Co. v. City of Columbus, 17 F. (2d) 630, 641 (S. D. Ohio 1927); Lilienthal, *Recent Developments In The Law of Public Utility Holding Companies* (1931) 31 COL. L. REV. 189, 204 (footnote quoting Mr. Justice Brandeis).

14. New England Divisions Case, 261 U. S. 184 (1923) (gifts); Dayton-Goose Creek Ry. Co. v. United States, 263 U. S. 456 (1924) (loans).

15. Euclid v. Ambler Realty Co., 272 U. S. 365 (1926).

16. Pacific American Fisheries v. Alaska, 269 U. S. 269 (1925). Also in point is the power of the Federal Radio Commission to allot as equally as possible broadcasting privileges in disregard of priority in the field and broadcasting capacity. Federal Radio Commission v. Nelson Brothers, 289 U. S. 266 (1933).

17. Assumed from an apparent failure to show the contrary.

18. A uniform allotment is hardly discriminatory. It need not operate with uniform fairness. Purity Extract Co. v. Lynch, 226 U. S. 192, 204 (1912); Hebe Co. v. Shaw, 248 U. S. 297, 303 (1919); Pierce Oil Corp. v. City of Hope, 248 U. S. 498, 500 (1919).

in an emergency private interests may be more greatly restricted than at other times[19] is hardly necessary to support this decision.[20] The approved power of the Interstate Commerce Commission to cripple certain industries by giving preferences in the public interest to products of others when an emergency arises,[21] is a power far in excess of that exercised in the present uniform allotment of production.[22]

A more difficult question is raised by the continuing injunction restraining the enforcement of penalties. The court recognized that a penal clause is unconstitutional if it inflicts an undue burden on a litigant who violates the law while testing its validity,[23] and apparently considered the Recovery Act penalties accumulating during the suit as excessive in this respect. But the hesitancy of the court to pass upon the legality of the provisions evidences a belief that its choice lies between two undesirable alternatives: to emasculate these *in terrorem* features of the Recovery Act merely because in this case their application would be unconstitutional,[24] or to preserve the vital weapons of enforcement and cause complainant to be unduly punished for litigation brought in good faith. It is submitted, however, that the court could refuse to invalidate the penal clauses and at the same time, through enjoining the collection of penalties, suspend their operation as to complainant for the period of litigation.

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19. Block v. Hirsh, 256 U. S. 135 (1921); *cf.* Highland v. Russell Car Co., 279 U. S. 253 (1929) (greater discretion permitted under war powers). Due process should be interpreted in the light of present conditions. *Cf. In re* Debbs, 158 U. S. 564, 591 (1895); Moyer v. Peabody, 212 U. S. 78 (1909); Hadacheck v. Los Angeles, 239 U. S. 394 (1915). The depression is recognized as such an emergency. Home Building and Loan Association v. Blaisdell, 54 Sup. Ct. 231 (1934).

20. Especially in view of the customary rules of refusal to pass on the policy of legislation, Otis v. Parker, 187 U. S. 606, 608, 609 (1903); Gant v. Oklahoma City, *supra* note 11, at 102; Home Building and Loan Association v. Blaisdell, *supra* note 19, including administrative orders, Interstate Commerce Commission v. Illinois Central Rr. Co., 215 U. S. 452, 470 (1910); and of presuming the validity of statutes, O'Gorman and Young v. Hartford Fire Insurance Co., 282 U. S. 251, 257, 258 (1931), and administrative orders, *cf.* Lieberman v. Van de Carr, 199 U. S. 552, 563 (1905); Los Angeles Gas and Electric Corp. v. Railroad Commission, 289 U. S. 287, 305 (1933); and of upholding legislation as constitutional where reasonable men differ, Williams v. Mayor and City Council of Baltimore, 289 U. S. 36, 42 (1933).

21. The restriction of coal shipments to favor certain industries in accordance with this statute has been upheld. Avent v. United States, 266 U. S. 127 (1924).

22. A claim presented by complainant was that this allotment would prevent fulfillment of contracts, and that he would thus be liable for damages. A contract duty is discharged, however, if a law prevents performance. CONTRACTS RESTATEMENT (Am. L. Inst. 1932) § 458, quoted with approval in Operators' Oil Co. v. Barbre, 65 F. (2d) 857 (C. C. A. 10th, 1933). N. R. A. or A. A. A. orders approved to date on grounds of due process include restriction of peach canning production, United States v. Calistan Packers, 4 F. Supp. 660 (N. D. Cal. 1933), fixing of milk prices, Capital City Milk Producers' Association v. Wallace, U. S. Law Week, Nov. 21, 1933, at 5 (D. C. Sup. Ct. 1933), and prohibition of premiums in the Oil Code, Victor v. Ickes, U. S. Law Week, Dec. 5, 1933, at 6 (D. C. Sup. Ct. 1933); United States v. Suburban Motor Service Corp., U. S. Law Week, Feb. 20, 1934, at 7 (N. D. Ill. 1934) (but declaring it invalid as an invasion of a state's power).

23. *Ex parte* Young, 209 U. S. 123 (1908); Missouri Pacific Ry. Co. v. Tucker, 230 U. S. 340 (1913); see Terrace v. Thompson, 263 U. S. 197, 215, 216 (1923).

24. The penalties are certainly not unreasonable in any respect other than penalizing litigation, if indeed they are for that reason.

Logically it may be controverted that equity can use its injunctive power to suspend a penal clause for a limited period. An injunction is said to restrain enforcement officials alone, the statute and accumulating penalties being unaffected and still enforceable if the officers will risk contempt of court.[25] Accordingly it has been held that a temporary injunction restraining enforcement of an oil inspection law, pending a suit attacking the validity of the act, merely prevented criminal prosecution, and that the accumulated penalties were collectible when the injunction was vacated.[26] Moreover, to permit temporary suspension of a penal clause is in effect to allow modification of punishment fixed by legislation, a power forbidden the judiciary.[27] Nevertheless the courts have in practice suspended penal clauses. A decision holding a state prohibition act unconstitutional was declared to have suspended the accumulation of penalties when later the same court upheld the statute;[28] retroactive suspension of a penal tax law has been permitted when collection of penal interest, accumulating during litigation, was enjoined at the termination of the suit;[29] and imposition of penalties for violation of railway rate legislation has been absolutely suspended pending the conclusion of a suit to test the validity of the law.[30] Furthermore, the logical obstacles to temporary suspension are not conclusive. The injunction, it is true, restrains enforcement officials alone, but it may be viewed as binding them to consider legislation inoperative during the injunction period, leaving as collectible only those penalties arising during periods not covered by court order.[31] Such a result may be justified on either of two theories. If penalties are considered so severe as to deny a constitutional right to test the validity of a statute, the court may be said merely to enjoin the operation of the penalty provisions while they are invalid. Collection of penalties contained in pipe line legislation has been enjoined to this limited extent.[32] When the constitutional requirement is satisfied, by the conclusion of the suit, the injunction ceases to have effect and the penalties are revived.[33] The other

25. See *Ex parte* Young, *supra* note 23, at 163.

26. State v. Wadhams Oil Co., 149 Wis. 58, 134 N. W. 1121 (1912); see Ray v. City of Belton, 162 S. W. 1015 (Tex. 1914).

27. *In re* Graham, 138 U. S. 461, 462 (1891); *In re* Bonner, 151 U. S. 242 (1894); *Ex parte* United States, 242 U. S. 27 (1916); see United States v. Meldrum, 146 F. 390, 395 (D. Ore. 1906). *Contra:* People v. Stickle, 156 Mich. 557, 121 N. W. 497 (1909).

28. State v. O'Neil, 147 Iowa 513, 126 N. W. 454 (1910) (not involving the injunctive power, however).

29. Litchfield v. County of Webster, 101 U. S. 773 (1879).

30. Louisville and Nashville Rr. Co. v. Railroad Commission, 157 Fed. 944 (C. C. M. D. Ala. 1907) (justified by statutory authorization and the inherent power of equity). Likewise has the operation of penalties for contempt of a utility commission order been prevented. New Hampshire Gas and Electric Co. v. Morse, 42 F. (2d) 490 (D. N. H. 1930).

31. This effects suspension. If enforcement officials are enjoined in reality the government itself is bound to treat the legislation as inoperative. Harkrader v. Wadley, 172 U. S. 148, 169 (1898); Fitts v. McGhee, 172 U. S. 516, 526, 531 (1899).

32. Kern Trading and Oil Co. v. Associated Pipe Line Co., 217 Fed. 273 (N. D. Cal. 1914). *Cf.* Phoenix Ry. Co. v. Geary, 239 U. S. 277, 283 (1915) (inference as to power to enjoin during "reasonable time" to prevent excessive penalties).

33. A state prohibition act, unconstitutional as interfering with interstate commerce, becomes constitutional on passage of a Congressional act permitting such prohibition. *In re* Rahrer, 140 U. S. 545 (1891).

theory presumes that the legislature did not intend to nullify its work by denying a litigant the right to test the statute, and therefore, by suspension, exempts the particular litigant from the penal clause on the ground that his situation was not within the purview of the legislative intendment. In accord with this view a railroad contesting penal rate legislation was deemed to possess during the litigation an exceptional status outside of the operation of the penal clause, and collection of penalties otherwise imposed by the statute for this period was enjoined.[34] In the last analysis what is here urged is simply that the court could declare unconstitutional *application* of the penalties to persons bringing a test case in good faith.

If it be determined that suspension of the Recovery Act penalties in the instant case is desirable, this result can easily be attained. The past injunction restraining enforcement of the penal provisions may be recognized as having had a suspensive effect.[35] Or, if deemed necessary, a special injunction may be issued suspending the penal clauses as to the particular penalties incurred during the litigation, by enjoining their collection.[36]

JUDICIAL INGENUITY AND A SOUTHERN STATE'S LIABILITY UPON CARPETBAG BONDS

IN *State v. Woodruff*,[1] the Supreme Court of Mississippi disposed finally of a complaint which, filed originally in 1888, has been pending in the courts of the state for forty-five years. This ancient litigation arose over the liability of the state upon a million dollar bond issue which a carpetbag legislature had authorized in 1871,[2] allegedly to aid in the construction of certain levees. The bonds, which were secured by taxes constituting a lien upon the lands owned by individuals in the district concerned, were to mature in 1882. For the protection of the bondholders the legislature provided that mandamus would lie against the administrative body of the district to compel collection of the taxes, and that when collected the taxes would constitute a trust fund for the payment of the bonds. But these remedies were of little avail in the face of the almost negligible value of the land and of the futility of attempting to collect the excessive taxes thereon; less than $21,000 was paid into the district's treasury during the years immediately following issuance of the bonds. With the downfall of the carpetbaggers, a systematic negation of their accomplishments, culminating in the repudiation of the bonds and the enactment in 1884 of a statute withdrawing the bondholders' remedies against the state,[3] was undertaken by the Democrats. The bondholders, failing to test the constitutionality of this act,

34. Coal and Coke Ry. Co. v. Conley and Avis, 67 W. Va. 129, 67 S. E. 613 (1910) (containing exhaustive treatment of authorities supporting this theory). The case is quoted with approval in Wadley Southern Ry. Co. v. Georgia, 235 U. S. 651 (1915).

35. See note 30, *supra*.

36. See note 29, *supra*.

1. 150 So. 760 (Miss. 1933).

2. Miss. Laws 1871, c. 1. The possibilities for graft inherent in the act are apparent. Complete administration of the funds received from sale of the bonds was placed in the hands of a board of commissioners whose power was subject to no supervision. The board was authorized to appoint all necessary subordinate officers and agents, and to determine their salaries, which were to be paid out of the levee fund. *Id.* §§ 1, 3, 25. It is significant that, within two weeks after the carpetbaggers lost control of the legislature, this board was abolished and its powers transferred to the public auditor. Miss. Laws 1876, c. 108.

3. Miss. Laws 1884, c. 168, § 30.

filed the present bill in 1888 to enforce the trust against the state and against the landowners both for taxes collected and for those due and uncollected. A demurrer alleging that the bond issue was invalid, that the statute of limitations had run and that the court had no jurisdiction, was overruled by the trial court solely upon the first ground, and this decision was sustained by the state supreme court.[4] On writ of error to the United States Supreme Court, however, a divided Court reversed the judgment and overruled the demurrer on the ground considered.[5] From a second hearing on the demurrer in the lower court another appeal to the state supreme court was taken in 1899. The opinion of that court is so confused and unclear that the members of the present court devoted tedious hours to its study before concluding that it held that the liability of the landowners and of the state was not limited to the taxes collected, but extended also to those that should have been collected.[6] At this point the state's attorneys for the first time questioned the jurisdiction of the court over the state—a fundamental issue, which, though raised in the demurrer, had not been before discussed.[7] Still on the demurrer, therefore, the case was brought before the state supreme court again in 1903; in the face of overwhelming authority to the contrary,[8] the court in that year declared that, despite the legislature's withdrawal of the remedies against the state in 1884, the state was properly made a party defendant.[9] Following this decision the case was referred by the trial court to a master, and there it remained for more than a quarter of a century as successive attorney-generals deferred examination of the voluminous records. Finally, in 1931 a report was rendered and an interlocutory decree entered holding the landowners and the state liable for all the taxes collected and uncollected. The appeal to the state supreme court was taken from that decree.[10]

The present Supreme Court of Mississippi, evincing some embarrassment over

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4. Woodruff v. State, 66 Miss. 298, 6 So. 235 (1889).

5. Woodruff v. Mississippi, 162 U. S. 291 (1896). Three of the justices joined in a dissenting opinion, and a fourth concurred with opinion.

6. Except for those claims barred by the ten-year statute of limitations. Woodruff v. State, 77 Miss. 68, 25 So. 483 (1899).

7. Generally where the record is silent as to whether a particular ground for a demurrer was argued, it will be deemed to have been waived. Baker v. Streater, 221 S. W. 1039 (Tex. 1920); Johnson v. Union National Bank of Houston, 242 S. W. 293 (Tex. 1922); *cf.* Southern Ry. Co. v. Melton, 158 Ala. 404, 47 So. 1008 (1908). However, the lack of a court's jurisdiction over the state cannot be waived by the state's attorneys in the absence of legislative authorization. *Cf.* O'Connor v. Slaker, 22 F. (2d) 147 (C. C. A. 8th, 1927); Owens v. State Highway Department, 163 S. E. 473 (S. C. 1932). Consequently the state was entitled to a hearing at any time upon the issue of jurisdiction.

8. "Although the state may, at the inception of the contract, have consented as one of its conditions to subject itself to suit, it may subsequently withdraw that consent and resume its original immunity without any violation of its contract in the constitutional sense." *In re* Ayers, 123 U. S. 443, 505 (1887); Hans v. Louisiana, 134 U. S. 1 (1890) (bonds); Baltzer v. North Carolina, 161 U. S. 240 (1896) (bonds). A suit already pending will be dismissed. South and North Alabama Rr. Co. v. Alabama, 101 U. S. 832 (1879); *Ex parte* State, 52 Ala. 231 (1875).

9. State v. Woodruff, 83 Miss. 111, 36 So. 79 (1903).

10. Appeal from an interlocutory decree is allowed in Mississippi. Miss. Code (1930) § 14. Since the controlling principles of the present case were presumably settled in 1899, the court, perhaps ironically, took jurisdiction in order "to avoid expense and delay."

the lengthy history of this controversy, appears to have concluded that justice would not be served by imposing the burden of the bonds upon the present generation of landowners and taxpayers. With this conclusion in mind, the court turned first to the case made against the landowners. Relief for these defendants was made readily available by the discovery that the complaint in seeking to bring them before the court named only "all persons claiming to own lands within the bounds" of the district "and who are too numerous to be made defendants individually and to be served with process"; the obviously fatal generality of this language[11] had inexplicably escaped judicial notice for forty-five years. With equal facility the court also dismissed the action against the few landowners who had been properly named and served with process.[12] But considerably greater difficulty was encountered in dealing with the liability of the state.

If the present court could have repudiated the admittedly erroneous decision of 1903 holding the state subject to suit, its apparent purpose would have been readily accomplished. But a question of law once determined by an appellate court ordinarily becomes the law of the case, whether correct or not, and may not be redetermined upon subsequent appeals in the same litigation except by a higher court.[13] It could be argued that when a state consents to be sued, no jurisdiction over the sovereign "person" is given the court since no execution can be levied against the state;[14] but jurisdiction over the subject-matter, the state's moral obligation upon the plaintiff's claim, is conferred on the proper court. Upon this analysis, withdrawal of the consent would deprive the court of all jurisdiction.[15] Thereafter, a decision that the state could be sued would be a nullity[16] and so could not constitute the law of the case. This argument was apparently not pressed upon the court in the principal case, however, and the conclusions followed that the 1903 decision controlled and that the plaintiffs were therefore entitled to maintain this action against the state.

Thwarted thus upon one approach, and on the other hand faced by its own inter-

11. New Orleans Land Co. v. Leader Realty Co., 255 U. S. 266 (1921); *cf.* Erskine v. Gardiner, 162 La. 83, 110 So. 97 (1926). A court may on its own motion dismiss a bill as to all persons not properly made parties to the suit. Progress Co. v. Salt Lake City, 53 Utah 556, 173 Pac. 705 (1918). The plaintiffs, not having alleged that the landowners were unknown after a diligent search, were not entitled to constructive process by newspaper publication. MISS. CODE (1930) § 2972. Probably the bondholders had given scant attention to the liability of most of the landowners, since as late as 1888 the value of the land was negligible.

12. Payment of taxes can be procured only in the manner provided by statute. Brachey v. Peddicord, 199 Ky. 75, 250 S. W. 511 (1923); State v. Piazza, 66 Miss. 426, 6 So. 316 (1889); Enochs v. State, 128 Miss. 361, 91 So. 20 (1922). Mandamus, the remedy given the plaintiffs by the Mississippi legislature in 1871, was never sought. The plaintiffs had thus pursued the wrong remedy against these landowners.

13. Baldwin Star Coal Co. v. Quinn, 46 Colo. 590, 105 Pac. 1101 (1909). The rule applies even though the decision is later overruled in a different case. Stonebaker v. Ault, 59 Okla. 189, 158 Pac. 570 (1906).

14. Westinghouse Electric & Manufacturing Co. v. Chambers, 169 Cal. 131, 145 Pac. 1025 (1915).

15. After such withdrawal of consent, the court may not even pass upon the state's moral obligation. *Cf.* McShane v. Murray, 106 Neb. 512, 184 N. W. 147 (1921).

16. Dix v. Dix, 132 Ga. 630, 64 S. E. 790 (1909); Lewis v. Lewis, 196 Ky. 701, 245 S. W. 509 (1922).

pretation of the 1899 decision as holding that the defendants' liability was not limited to the amount of taxes actually collected,[17] the present Mississippi court evolved a novel and ingenious solution of its dilemma. Disregarding the fact that it had itself raised the issue for the first time on appeal, and overruling the vigorous dissent of several of the judges, the court held that if the state were now forced to pay the bondholders, the laches[18] of its attorney generals would preclude its securing reimbursement from the landowners whose lands were security for the taxes which should have been collected; in such an action for reimbursement, the court declared, the state would be suing as trustee and not as sovereign, and so would be bound by the derelictions of its officials.[19] In view of this circumstance, the question, according to the court, was whether or not the plaintiffs in this action should be allowed to recover more than the $21,000 of collected taxes, liability for which was admitted by the state, and so to throw the entire burden of its bond issue upon the state. This question the court answered in the negative; apparently justice required that the burden which the state had assumed and which it had evaded for forty years, should now be shifted to the plaintiffs. In making clear how the defendant's own laches could relieve it of liability, the court explained that in this action the state could not be bound by the omissions of its attorney-generals. Similarly, it was held that the failure of present counsel for the state to raise the laches argument in the trial court and so to make it a part of the trial court record, could not deprive the state of a valid defense.

As an enunciation of law, the court's latches argument approaches the ridiculous; logically, the laches of a defendant should improve, not impair, a plaintiff's right to recover. The members of the court were themselves in such disagreement over the treatment of the whole case that no single majority agreed with the decisions upon the various issues presented.[20] But when a court is so patently devoting its attention to the attainment of a given result, its decision should be appraised not on the correctness of its law but upon the justice of that result and the degree of ingenuity shown in achieving it. Upon this basis, support for the decision in the instant case is to be found, if at all, in local antagonism toward carpetbag bonds and in the depression finances of an harassed state treasury.

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17. The necessity for this interpretation is open to question. In Woodruff v. State, *supra* note 6, at 108, 25 So. at 486, it was stated that: *Until they were collected,* the charges and assessments were not a trust fund, but existed only as a tax levied on the land. . . . *When collected,* the taxes became a fund which the act declared should be a trust fund and pledged to creditors." And the statute provided that the taxes levied "shall be as they are from time to time *collected,* and they are hereby constituted a special fund and trust . . ." Miss. Laws 1871, c. 1, § 10. (Italics added.)

18. An appellate court ordinarily cannot raise the question of laches on its own motion. Parkside Realty Co. v. MacDonald, 166 Cal. 426, 137 Pac. 21 (1913); Cook v. Darnell, 100 Cal. App. 491, 280 Pac. 383 (1929); Tanous v. Johnston, 113 Ore. 343, 232 Pac. 793 (1925).

19. The state is not ordinarily bound by the omissions of its agents or officials in the enforcement of a public right. United States v. Beebe, 127 U. S. 338 (1888); Terre Haute & Indianapolis Rr. Co. v. State, 159 Ind. 438, 65 N. E. 401 (1902); State v. Paul, 113 Kan. 412, 214 Pac. 425 (1923).

20. One judge concurred only in the decision upon one issue, while two other judges dissented only from that issue. The affirmative votes of these three judges were necessary in the determination of a majority of the court.

TAX DEDUCTIONS FOR DEPRECIATION AND DEPLETION ON THE INCOME OF CESTUIS QUE TRUSTENT

A RECENT comment[1] discusses at length the theory, mathematics and proper application of the sections of the Revenue Acts providing for depletion allowances. It was there pointed out that unless an adequate deduction is permitted for depletion, earnings which should be classified as return of capital will be taxed as income—a result which, if not unconstitutional,[2] is clearly undesirable. The analysis and conclusion is applicable as well to depreciation allowances, since reserves for depreciation and depletion, though dealing with different forms of assets, serve the same function and are otherwise identical.[3] Two recent cases raise the problem of the applicability of such depletion and depreciation allowances to the interests of cestuis que trustent.

In *Helvering v. Falk* an iron mine was conveyed to trustees to hold during two lives and twenty-one years. It was subject to a fourteen year lease, but its life was estimated at only nine years. The trust deed provided that all the proceeds from the mine which should come into the hands of the trustees were to be distributed to the beneficiaries. In filing income tax returns, the cestuis sought to deduct from their gross incomes sums representing proportionate shares of the depletion allowance permitted under the Revenue Acts.[4] These deductions were rejected by the Commissioner, whose decision was sustained by the Board of Tax Appeals,[5] but reversed by the Circuit Court of Appeals[6] and by the Supreme Court.[7]

If the settlor in the instant case had chosen to give to the donee beneficiaries each year an amount measured by the annual yield of the mine, these annual payments would be classed as gifts and exempted from income taxation.[8] If the donor had given the beneficiaries a lump sum equal to the value of the mine, the donees would not be subject to an income tax upon the gift, but only upon the income derived therefrom. When he gave them the whole annual yield of the mine, placing legal title to it in trustees who were to pass on all the proceeds to the beneficiaries, his

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1. (1934) 43 YALE L. J. 466.

2. See Cooper v. Reynolds, 60 F. (2d) 650, 653 (D. Wyo. 1932). In Stanton v. Baltic Mining Co., 240 U. S. 103 (1916), the Court held that a tax which did not take into consideration adequate depletion allowances would be a tax on the "results of the business of carrying on mining operations," but this would not necessarily apply to individual returns. There is some discussion of this problem in Magill, *The Income Tax Liability of Annuities and Similar Periodical Payments* (1924) 33 YALE L. J. 229.

3. See Brandeis, J., in United States v. Ludey, 274 U. S. 295, 301 (1927), and Stone, J., dissenting in Helvering v. Falk, 54 Sup. Ct. 353, 356 (1934).

4. 42 STAT. 241 (1921), 26 U. S. C. § 955 (9) (1926).

5. Falk v. Commissioner of Internal Revenue, 24 B. T. A. 299 (1931).

6. Falk v. Commissioner of Internal Revenue, 64 F. (2d) 171 (C. C. A. 7th, 1933).

7. Helvering v. Falk, *supra* note 3.

8. "The term 'gross income' does not include the following items, which shall be exempt from taxation under this title [the income tax]: (3) The value of property acquired by gift, bequest, devise, or descent (but the income from such property shall be included in gross income)." 43 STAT. 267, 268 (1924), 26 U. S. C. § 954 (b) (1926), reenacted with no material alteration in 47 STAT. 178 (1932), 26 U. S. C. SUPP. VI § 22 (1932). In Burnet v. Whitehouse, 283 U. S. 148 (1931), an annuity for life to be paid out of residue of testator's estate was held to be a legacy exempt from income taxes. Since the present note is concerned solely with the income tax, the application of gift and estate taxes to these situations is not considered.

action was tantamount to providing that the cestuis should receive annual gifts of the corpus of the trust in addition to the income upon the total amount in trust. The latter is properly subject to an income tax, but the rest of the annual payments are outright gifts of the principal, and must consequently be exempted from the tax. Mr. Justice Stone, dissenting, argued that the cestuis should not be allowed any deduction for depletion because they had made no capital investment. However, the annual amounts yielded by a mine, just as those received from an annuity, are made up of income (profit or interest on the capital invested in the mine or the annuity) and principal (the capital itself).[9] And payments of principal are exempted from taxation under the income tax laws whether they are received by way of return of capital or as gifts.[10] The Court has held that the legal form of the taxpayer's interest is immaterial in determining income tax liability,[11] and that the existence of a trust does not affect the right to deduct for depletion.[12]

A case decided on the same day involved an estate which had been left in trust for various beneficiaries, with remainders to their descendants, or, in case of failure of issue, to Harvard University. For a number of years the trustee distributed the income without deducting anything for depreciation of the buildings and other assets of the corpus. In 1928 the California court having jurisdiction of the estate ordered him to withhold depreciation allowances in the future, and to recover from the beneficiaries all sums paid in the past which should have been withheld for a depreciation reserve. This order was carried out by the beneficiaries through delivery of non-interest-bearing notes to the trustee, payable to the remaindermen upon termination of the trust. The Commissioner sought to collect income taxes on these overpayments for all the years in which they had been distributed, although the Revenue Acts require cestuis to pay taxes only on income that is "distributable."[13] The Supreme Court held that the adjudication of the California court was determinative as to what was distributable income, and refused to charge the cestuis for taxes on the sums represented by the notes.[14] In a persuasive dissenting opinion, Mr. Justice Cardozo argued in favor of sustaining the tax on the ground that "substantial benefits" were

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9. *Cf.* Comment, *supra* note 1, at 467.

10. For the application of the Revenue Acts to income from annuities, see U. S. TREAS. REG. 77 (1932) arts. 62 and 82; and Fehr, *What is an Annuity for Income Tax Purposes?* (1929) 7 NAT. IN. TAX MAG. 259.

11. Lynch v. Alworth-Stephens Co., 267 U. S. 364 (1925); Palmer v. Bender, 287 U. S. 551, 557 (1933).

12. Merle-Smith v. Commissioner of Internal Revenue, 42 F. (2d) 837 (C. C. A. 2d, 1930), *cert. den.*, 282 U. S. 897 (1931).

13. 42 STAT. 246 (1921), 26 U. S. C. § 960 (1926).

14. Freuler v. Helvering, 54 Sup. Ct. 308 (1934). The litigation involving the trust established by A. C. Whitcomb in his will for the beneficiaries who are the parties in this suit and for other beneficiaries whose suits are all finally disposed of in their favor by this decision, appears in Whitcomb v. Commissioner of Internal Revenue, 4 B. T. A. 80 (1926); 5 B. T. A. 191 (1926); Whitcomb v. Blair, 25 F. (2d) 528 (D. C. App. 1928) (all denying the deduction for depreciation on the beneficiaries' returns before the California court had ordered the overpayments returned); Whitcomb v. Commissioner of Internal Revenue, 22 B. T. A. 118 (1931) (permitting the deduction after the decision of the California court); Commissioner of Internal Revenue v. Freuler, 62 F. (2d) 733 (C. C. A. 9th, 1933); Burnet v. Whitcomb, 65 F. (2d) 803 (D. C. App. 1933) (both denying the deduction in spite of the decision of the California court).

received by the beneficiaries by virtue of their control of money to which they were not entitled and because of the method of repayment employed. During the period before maturity of the notes the cestuis may earn for themselves considerably more income from these sums than would be possible if the trustee were administering them under the laws applicable to trust investments. Similarly, they may use and risk loss of all the money, and, when application is made for payment of the notes, they may resort to a bankruptcy court. Moreover, the remaindermen are all closely related to the present cestuis, and there may never be a demand for satisfaction of the obligations. These benefits are indeed substantial and should not be disregarded; though, because they may not be entirely equivalent in value to the sums returned, it would seem unusually severe to treat the whole amount in question as taxable income. Furthermore, the beneficiaries have paid, and will continue to pay, taxes on the income annually realized from their investment of the money.

But this case might have been decided without resort to a discussion of the effect of the overpayments and execution of the notes. It is conceivable that a trust deed, as in the *Falk* case, might specifically instruct the trustee to distribute all the proceeds to the beneficiaries without regard for a depreciation reserve.[15] The cestuis would, it is true, receive greater economic benefit than those who are paid only net income with depreciation allowances deducted. But it must be assumed that the settlor of such a trust intended that part of the principal should be given outright periodically to the temporary tenant at the expense of the remaindermen, and that current distribution should not be limited to income. Under this arrangement the cestuis would receive the principal of the legacy as well as the income, since both depreciation and depletion reserves are properly classed as principal.[16] Upon the analysis presented above, therefore, the cestuis of such a trust should be permitted, in determining their tax liability, to deduct from the gross amounts distributed to them the portion which represents principal.[17] A fortiori, the deduction should be allowed in the instant case, where, by order of the state court, none of the principal was to be paid out with income and the cestuis were required to return the erroneously distributed depreciation reserve.

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15. The proceeds of property generally classed as "wasting assets" are often distributed to the beneficiaries, whether cestuis que trustent, partners, or stockholders, without allowances for depletion, apparently on the theory that the investors intended only to invest in that piece of property, and, when its value is gone, will want to be able to reinvest their capital at will.

16. See Palmer v. Bender, *supra* note 11, at 558.

17. The earlier statutes allowed as a deduction from gross income, for individuals, "a reasonable allowance for exhaustion, wear and tear of property. . . " 43 STAT. 269, 270 (1924), 26 U. S. C. § 955 (8) (1926). The latest statute adds the following words: "In the case of property held in trust, the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each." 47 STAT. 179, 181 (1932), 26 U. S. C. SUPP. VI § 23 (k) (1932). This change perhaps shows that Congress intended to permit cestuis to make depreciation deductions, since most cases involving facts similar to those in the instant case have been decided adversely to the cestuis. Roxburghe v. United States, 64 Ct. Cl. 223 (1927), *cert. den.*, 278 U. S. 598 (1928); Hubbell v. Burnet, 46 F. (2d) 446 (C. C. A. 8th, 1931); Codman v. Commissioner of Internal Revenue, 50 F. (2d) 763, 766 (C. C. A. 1st, 1931); Roxburghe v. Burnet, 58 F. (2d) 693 (D. C. App., 1932). See Kaufmann v. Commissioner of Internal Revenue, 44 F. (2d) 144, 146 (C. C. A. 3d, 1930). In Baltzell v. Mitchell, 3 F. (2d) 428 (C. C. A. 1st, 1925), deductions for depreciation due to capital losses from stock sales were not permitted to the cestui.

RIGHT OF LIFE TENANT TO PROFITS OF BUSINESS DURING AUTHORIZED POSTPONEMENT OF SALE BY EXECUTOR

ORDINARILY, pecuniary legacies or interest thereon, when no time of payment is fixed, become payable one year from the testator's death.[1] Where, however, there is a devise of the interest or income, either of a whole or of a part of the residue of an estate, to one person for life, with remainder over, the life tenant is entitled to interest from the date of the testator's death, in the absence of a contrary provision in the will.[2] When such residue consists wholly or partly of property other than money, and the testator fails to specify the form in which it is to be enjoyed by the life tenant, the rule of *Howe v. Earl of Dartmouth*[3] requires that the property be immediately converted into securities authorized by statute for the investment of trust funds.[4] If the executor fails to make the conversion promptly, the life tenant is entitled only to an equitable income based on the property's estimated value at the time of the testator's death, and not to the actual income the executor has received.[5]

A novel situation arises where the testator, leaving residuary property to a life tenant, directs the executor to delay sale for a specified time following his death, and fails to state what the life tenant shall receive during the intervening period. In a recent case[6] the testator provided for the creation of a trust out of the residue of his estate, one-third of the income to be paid to his widow for life with remainder over to his lawful issue upon her death. The residue included an extensive shoe business, which the executor was directed to operate for such time as he should deem most advantageous to the benefit of the estate, but in no case beyond two years after the testator's death, when it should be sold. During its operation by the executor, but prior to the establishment of the trust, the business profited to an

1. See, e.g., N. Y. SURROGATE'S COURT ACT (1920, amended 1928) § 218; Redfield v. Marvin, 78 Conn. 704, 707, 63 Atl. 120, 121 (1906).

2. Green v. Green, 30 N. J. Eq. 451, 456 (1879); Corle v. Monkhouse, 47 N. J. Eq. 73, 77, 20 Atl. 367, 368 (1890).

3. 7 Ves. 137 (1802).

4. The testator may avoid the result of *Howe v. Dartmouth* by providing that the property is to be enjoyed in specie, *In re* Beaufoy's Estate, 1 Sm. & G. 20 (1852), or by stating that the entire or actual income is to be paid to the life tenant. *In re* Chancellor, 26 Ch. D. 42 (1884); *In re* Crowther, [1895] 2 Ch. 56. It should be observed that the rule applies only in the case of residuary property, as distinguished from specific bequests. *In re* Van Straubenzee, [1901] 2 Ch. 779, 782.

5. In England this rule has recently been altered, in the matter of real estate, by Section 28 of the Law of Property Act, 15 GEO. V, c. 20, § 28 (2) (1925), providing that "subject to any direction to the contrary [by the testator] . . . the net rents and profits of the land until sale shall be paid . . . [to the persons entitled to the income after conversion]." *In re* Brooker's Trusts, 1926 W. N. 93. However, the rule still applies to property other than leaseholds. *In re* Trollope's Will Trusts, [1927] 1 Ch. 596. In this country it is generally held that if a testator leaves unproductive real estate or personalty to be converted for the benefit of a life tenant, and there is a delay before sale is possible, the life tenant is entitled out of the proceeds of the sale to the amount of income he would have received had the conversion been made immediately upon the death of the testator. Edwards v. Edwards, 183 Mass. 581, 67 N. E. 658 (1903); Comment (1930) 40 YALE L. J. 275.

6. Gaede v. Carroll, 169 Atl. 172 (N. J. Eq. 1933).

extent of $800,000. The widow contended that she was entitled to one-third of the actual income earned during the interval following her husband's death, while the executor claimed that the $800,000 belonged to the corpus for the benefit of remaindermen. The court, relying principally on *Howe v. Dartmouth,* held that the widow should receive no share of the profits but only the accrued equitable interest based on an estimated value of the business at the time of the testator's death.

There is an important distinguishing feature between *Howe v. Dartmouth* and the present case. In the former the testator made no provision as to whether the personal estate should immediately be converted into investment securities or whether it should be enjoyed by the life tenant in specie. The purpose of the rule adopted was to provide for an equitable division of profits between life tenant and remainderman,[7] where the testator failed to indicate his intention and it was entirely uncertain what he desired. In the present case, however, it is clear that the testator intended no immediate conversion, since the executor was specifically directed to carry on the business for two years, or at least until a favorable opportunity for sale should present itself. Thus far the courts, faced with such a provision for postponement of sale, have apparently failed to utilize *Howe v. Dartmouth* in determining the rights of the life tenant. The most frequently recurring example of profits in the testator's business accruing after his death appears in the case of partnerships whose articles provide for their continuation during a stated period following the death of any partner. Where such a partner devises the residue of his estate, including his interest in the partnership, to a life tenant, the latter is ordinarily awarded the actual profits earned after the testator's death unless the will has provided otherwise.[8] But if it appears to be the testator's intent that the actual profits of the business are to go to the general fund, rather than to the life tenant, the court will undoubtedly so decree.[9] In the present case the general direction to the executor to invest the residuary funds in bonds, mortgages or authorized securities, together with "other provisions of the will" not set forth in the opinion, were considered by the court to indicate an intention that the profits of the shoe business pending conversion were to be applied to the trust res. On the other hand, it might equally well be argued that the testator's direction to postpone conversion showed an intention that those profits should go to the life tenant. In any event, if there is serious doubt as to his intention, it would seem, for purposes of simplifying administration and in view of the testator's normally closer relationship with the life tenant than with the remainderman, that the life tenant should not be restricted to an equitable income, but should be awarded the actual profits earned during the authorized postponement of conversion.

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7. As stated by Lord Eldon: "As in the one case that, in which the Tenant for life has too great an interest, is melted for the benefit of the rest, in the other that, of which, if it remained in specie, he might never receive any thing, is brought in; and he has immediately the interest of its present worth." Howe v. Earl of Dartmouth, *supra* note 3, at 148.

8. Buckingham v. Morrison, 136 Ill. 437, 27 N. E. 65 (1891); Heighe v. Littig, 63 Md. 301 (1885); *In re* Weaver's Estate, 53 Misc. 244, 104 N. Y. Supp. 475 (Surr. Ct. 1907); *cf. In re* Rogers, 37 Misc. 54, 74 N. Y. Supp. 829 (Surr. Ct. 1902) (no provision for continuation, but executors permitted the surviving partner to carry on the business for two years). *Contra:* Mudge v. Parker, 139 Mass. 153, 29 N. E. 543 (1885); *In re* Prince's Will, 141 Misc. 600, 252 N. Y. Supp. 908 (Surr. Ct. 1931); Fearns v. Young, 9 Ves. 549 (1804).

9. Willard's Ex'r v. Willard, 21 Atl. 463 (N. J. Ch. 1891).

NECESSITY OF HEARING TO DETERMINE NEED FOR ELIMINATION OF GRADE CROSSING

THE Highway Commissioner of the Commonwealth of Virginia, acting pursuant to a statute[1] which empowered him to order the elimination by a railroad of any grade crossing on a state road when in his opinion public safety and convenience so required, ordered the Southern Railway Company to build an overhead structure at a certain point on its right of way, and furnished it with plans for the proposed structure. The statute afforded the railroad no right to notice or hearing prior to the commissioner's order. But it did provide for an administrative review should the railroad be dissatisfied with the plans and specifications; in that event the Corporation Commission was empowered to consider the proposed plans and approve or modify them. Costs were to be divided between the state and the railroad. The company refused to undertake the work and demurred to an order of the Corporation Commission requiring it to proceed. The Supreme Court of the United States, reversing the Supreme Court of Appeals of Virginia,[2] held the statute unconstitutional on the ground that it empowered an executive officer, without notice to the railroad or opportunity to be heard, to make a final determination of fact and on the basis of that determination to take private property for a public use.[3]

It has long been established that a state may, in the exercise of its police power, provide for the elimination of grade crossings at the expense of a railroad. In accepting a charter the railroad agrees to the imposition of these charges, and such taking of property as may result does not violate the guaranties of the Fourteenth Amendment.[4] The discretionary power of determining what crossings shall be eliminated may be exercised by the legislature itself without notice or hearing[5] or delegated to the governing body of a municipality, which may also without prior notice or hearing require the construction of a viaduct at the expense of the railroad.[6] Statutes vesting discretion in administrative bodies to order the removal of "dangerous" crossings have, it is true, usually provided for notice to the railroad and opportunity to be heard,[7] but there would seem to be little difference between delegation of ex

1. VA. CODE ANN. (Michie, 1930) § 3974a.

2. Southern Ry. Co. v. Commonwealth, 159 Va. 779, 167 S. E. 578 (1933).

3. Southern Ry. Co. v. Commonwealth, 54 Sup. Ct. 148 (1933), Hughes, C. J., and Cardozo and Stone, J. J., dissenting.

4. New York and New England Rr. Co. v. Bristol, 151 U. S. 556 (1894). It may also be argued that there is here no taking of property within the meaning of the Fourteenth Amendment [*cf.* Chicago, Burlington & Quincy Ry. Co. v. Drainage Commissioners, 200 U. S. 561, 583 (1906)] since the structure replacing the grade crossing is a valuable asset of the company, reducing the possibility of liability for crossing accidents. See also Northern Pacific Ry. Co. v. Duluth, 208 U. S. 583, 594 (1908).

5. *Cf.* New York and New England Rr. Co. v. Bristol, *supra* note 4, upholding a statute which ordered the removal by railroads of one grade crossing a year for every sixty miles of road operated in the state. See also N. J. COMP. STAT. (Supp. 1924) § 167-29.

6. St. Louis v. Missouri Pacific Ry. Co., 262 Mo. 720, 174 S. W. 73 (1914); *cf.* Chicago, Burlington & Quincy Rr. Co. v. Nebraska, 170 U. S. 57 (1898); Northern Pacific Ry. Co. v. Duluth, *supra* note 4; Birmingham v. Louisville & Nashville Rr. Co., 213 Ala. 92, 104 So. 258 (1925); see Kansas v. Missouri Pacific Ry. Co., 33 Kan. 176, 189, 5 Pac 772, 780 (1885).

7. See CONN. GEN. STAT. (1930) § 3670; IND. STAT. ANN. (Burns 1926) § 12841; N. J. COMP. STAT. (Supp. 1924) §§ 167-30 to 167-36, upheld in Erie Rr. Co. v. Board of Public

parte powers in such matters to a city council and delegation thereof to a commission or to a single commissioner as provided by the Virginia statute; unless the distinction be that a city council, as opposed to a commission, is a legislative tribunal whose determinations are presumed to be valid without a finding of fact.[8] But this distinction, illusory in any case, vanishes if the statute in question merely fails to provide for a hearing and finding of fact upon questions which cannot reasonably be disputed.

Hearings are without doubt of value, where the elimination of grade crossings is concerned, for the determination of controversial matters such as the type of structure most suitable to replace a particular crossing, the plans and specifications and the division of costs. But the statute in the principal case is not deficient in these respects.[9] It only fails to provide a hearing on the question of the necessity for the elimination of the crossing at grade. And the usefulness of such hearings is open to serious question. For although the courts, in searching for definitive standards by which to rationalize their control of administrative bodies, have been able to set up certain criteria for the guidance of commissions in measuring the necessity and expediency of the removal of grade crossings,[10] these criteria are in practice of little importance. Few if any crossings fail to conform to the required standard of danger and inconvenience.[11]

The Court quotes at length from two rate cases[12] where it was said that a finding without evidence by an administrative commission is per se arbitrary and baseless, and concludes that a hearing is equally essential in the principal case. But in the words of Mr. Justice Holmes, "the power of the State over grade crossings derives little light from cases on the power to regulate trains."[13] Arbitrary action need not be feared. If it is not prevented by the self-interest of the state, which in the instant case must pay for half of that part of the structure extending beyond

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Utility Commissioners, 254 U. S. 394 (1921); N. Y. RAILROAD LAW (McKinney, 1918) §§ 91, 95; PA. STAT. ANN. (Purdon, 1930) tit. 67, § 392, construed in Delaware & Hudson Co. v. Public Service Commission, 96 Pa. Super. Ct. 169 (1929); VT. PUB. LAWS (Proposed Revision, 1933) § 6026.

8. St. Louis v. Missouri Pacific Ry. Co., *supra* note 6; see Durham v. Southern Ry. Co., 185 N. C. 240, 244, 117 S. E. 17, 19 (1923), *aff'd,* 266 U. S. 178 (1924).

9. Note 1, *supra.*

10. See Erie Rr. Co. v. Board of Public Utility Commissioners, 89 N. J. L. 57, 68, 98 Atl. 13, 18, (1916), *aff'd,* 254 U. S. 394 (1921); Commerce Commission v. Cleveland, Cincinnati, Chicago & St. Louis Ry. Co., 309 Ill. 165, 171, 140 N. E. 868, 870 (1923); *In re* Staten Island Rapid Transit Ry. Co., 220 App. Div. 80, 221 N. Y. Supp. 129 (2d Dep't 1927) *passim, aff'd,* 245 N. Y. 643 (1927).

11. Perhaps at some crossings unfrequented either by trains or automobiles, protection by watchmen would not impede traffic and the expenditure of large sums on a viaduct might not be in the public interest. *Cf.* Delaware & Hudson Co. v. Public Service Commission, *supra* note 7. But "extraordinary care . . . aided by all the advances in science and mechanics, has only resulted in lessening the risk, not in abolishing it." Scranton & Pittston Traction Co. v. Delaware & Hudson Canal Co., 180 Pa. 636, 640, 37 Atl. 122, 124 (1897), modified, 181 Pa. 582, 37 Atl. 1118 (1897). The improbability of purely arbitrary action under the Virginia statute is discussed *infra.*

12. Interstate Commerce Commission v. Louisville & Nashville Rr. Co., 227 U. S. 88, 91 (1913), and Chicago, Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U. S. 418, 457, 458 (1890).

13. Erie Rr. Co. v. Board of Public Utility Commissioners, *supra* note 7, at 410.

the railroad's right of way,[14] it can always be curbed by "equity's long arm."[15] The only effect of the decision, therefore, is to require time-consuming formalities in the determination of facts which are in their nature self-evident.[16]

Impairment of Private Rights by Interstate Compact

Although the Constitution provides that "No state shall enter into any treaty, alliance, or confederation,"[1] an implied sanction of certain forms of interstate agreements is found in the further provision that "No state shall, without the consent of Congress . . . enter into any agreement or compact with another state, or with a foreign power."[2] The typical use of such compacts has been in the adjustment of regional problems involving more than one state but still not national in scope. Boundary disputes, the allocation of water rights in irrigation projects, questions of conservation of natural resources, harbor problems, and matters of state criminal jurisdiction have all been settled by this means.[3] It has also been suggested as a possible method of strengthening state control over interstate transmission of electricity and of expanding the jurisdiction of the states over public utility holding companies.[4] But the potentialities of interstate agreements will depend upon whether or

14. Note 1, *supra.*

15. See Southern Ry. Co. v. Commonwealth, *supra* note 2, at 794, 167 S. E. at 582; Lehigh Valley Rr. Co. v. Board of Public Utility Commissioners, 278 U. S. 24, 40 (1928); Allen v. Distilling Co. of America, 87 N. J. Eq. 531, 543, 100 Atl. 620, 624 (1917).

16. The dissenting Justices thought the statute valid upon the similar theory that the power delegated was one to abate a nuisance, and therefore exercisable without notice or hearing. *Supra* note 3, at 151; *cf.* Commonwealth v. Roberts, 155 Mass. 281, 29 N. E. 522 (1892); Health Department v. Trinity Church, 145 N. Y. 32, 39 N. E. 833 (1895).

1. U. S. Const., art. 1, § 10.

2. *Ibid.* These provisions have been interpreted to require congressional consent only in cases affecting the increase or diminution of the political power of a state. Cooley, Constitutional Law (4th ed. 1931) 130; 1 Willoughby, The Constitutional Law of the United States (2d ed. 1929) § 172; Bruce, *Compacts and Agreements of States* (1918) 2 Minn. L. Rev. 500; see Virginia v. Tennessee, 148 U. S. 503, 518, 519 (1893); Union Branch Rr. Co. v. East Tennessee & Georgia Rr. Co., 14 Ga. 327, 338, 339, 340 (1853); *cf.* Wharton v. Wise, 153 U. S. 155 (1894); Dover v. Portsmouth Bridge, 17 N. H. 200 (1845). But *cf.* Comment (1922) 31 Yale L. J. 635. Even where the consent of Congress is admittedly necessary, such consent may be implied from subsequent conduct of Congress sanctioning the objects of the agreement or aiding in their enforcement. Green v. Biddle, 21 U. S. 1 (1823); Virginia v. Tennessee, *supra*; 2 Story, Commentaries on the Constitution of the United States (5th ed. 1891) § 1405; *cf.* Wharton v. Wise, *supra.*

3. Frankfurter and Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments* (1925) 34 Yale L. J. 685, 696, 735; Carpenter, *Reserve Treaty Powers of the States* (1921) Colorado Bar Association Rep. 45, 76; Warren, The Supreme Court and Sovereign States (1924) 121. Various kinds of interstate compacts have been considered in Green v. Biddle, *supra* note 2; Marlatt v. Silk, 36 U. S. 1 (1837); Wharton v. Wise, *supra* note 2; Central Rr. Co. v. Jersey City, 209 U. S. 473 (1908); Virginia v. West Virginia, 220 U. S. 1 (1911); Olin v. Kitzmiller, 259 U. S. 260 (1922); Kansas City v. Fairfax Drainage District, 34 F. (2d) 357 (C. C. A. 10th, 1929), *cert. den.*, 281 U. S. 722 (1930); Chesapeake and Ohio Canal Co. v. Baltimore and Ohio Rr. Co., 4 Gill & J. 1 (Md. 1832); Couch v. State, 140 Tenn. 156, 203 S. W. 831 (1918).

4. *Cf.* Crawford, *Control of Interstate Transmission of Electricity* (1929) 5 J. Land and

not they are susceptible to attack under a state or federal due process clause where they interfere with private rights previously established by law.

A recent case raises the issue. Colorado and New Mexico entered into a compact[5] whereby the waters of a river flowing through both states were to be "rotated" to meet as nearly as possible the rights of appropriators in each. The execution of the compact necessitated interference with a Colorado company's use of water to which it had previously acquired priority by court decree. A mandatory injunction was sought to protect this right. The appropriation system as opposed to the riparian is in force in Colorado, and rights to the use of water are accordingly based not upon the reasonable needs of each riparian owner but upon priority of appropriation.[6] The state constitution, moreover, dedicates the water of every natural stream to the use of the public subject to appropriation and declares that the power to appropriate unclaimed waters of a stream shall never be denied.[7] Under state statutes passed pursuant to these provisions the plaintiff held its decreed priority, part of which it would necessarily lose if the compact were enforced. And Colorado has held that such a decreed priority is not only a property right but a freehold.[8] The plaintiff's water rights, therefore, were not like franchises granted by the state and subject to revocation at the pleasure of the legislature.[9] They were more nearly analogous to a grant of title to real property of which it could not be deprived without due process of law. The Supreme Court of Colorado ruled that under the state due process clause, the terms of which are the same as the Fourteenth Amendment, the plaintiff's decreed priority could not be infringed by interstate compact, and granted the injunction prayed.[10]

The Constitution does not provide that rights once established by law shall be unalterable. If the dispute between Colorado and New Mexico had originally been

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PUB. UTIL. ECON. 229; Bigham, *Regulation of Interstate Transmission* (1929) 5 *id.* 385; Crawford and Mosher, *Federal Control of Interstate Utilities* (1932) 9 PUB. UTIL. FORT. 80; (1925) FEDERAL POWER COMMISSION REP. 10; Frankfurter and Landis, *supra* note 3. However, most of these commentators conclude that the use of the compact device is in this connection impracticable.

5. The consent of Congress was secured. 43 STAT. 796 (1925).

6. COLO. CONST., art. 16, § 6; Hammond v. Rose, 11 Colo. 524, 19 Pac. 466 (1888); Wiel, *Priority in Western Water Law* (1909) 18 YALE L. J. 189; 1 WIEL, WATER RIGHTS (3d ed. 1911) § 299.

7. COLO. CONST., art. 16, §§ 5, 6.

8. Travelers' Insurance Co. v. Childs, 25 Colo. 360, 54 Pac. 1020 (1898); Monte Vista Canal Co. v. Centennial Irrigating Ditch Co., 22 Colo. App. 364, 123 Pac. 831 (1912); *cf.* Idaho Irrigation Co. v. Gooding, 265 U. S. 518 (1924); Strickler v. City of Colorado Springs, 16 Colo. 61, 26 Pac. 313 (1891); Hilt v. Weber 252 Mich. 198, 233 N. W. 159 (1930); Skinner v. Jordan Valley Irrigation District, 137 Ore. 480, 300 Pac. 499 (1931), 3 P. (2d) 534 (1931).

9. *Cf.* Smith, *Judicial Interpretation of Public Utility Franchises* (1930) 39 YALE L. J. 957.

10. La Plata River & Cherry Creek Ditch Co. v. Hinderlider, 25 P. (2d) 187 (Colo. 1933), noted in (1934) 34 COLO. L. REV. 169. Appeal has been taken to the United States Supreme Court. Docket No. 588. An interesting question of jurisdiction is involved, since the state court rested its determination upon the Colorado Constitution. Will the fact of congressional approval of the compact enable the Supreme Court to take jurisdiction nevertheless? The Court has postponed consideration of the jurisdictional issue to the hearing on the merits. U. S. Law Week, Dec. 19, 1933, at 13.

brought before the United States Supreme Court it is conceivable that the same result would have been reached judicially as was attained by compact.[11] And in that event, after a full hearing upon the matter, private parties could not have enjoined enforcement of the decree. Nothing in the Fourteenth Amendment requires that a different effect be accorded a settlement reached by interstate agreement. Due process is not an exclusive prerogative of the courts. Indeed, the recognized purpose of the interstate compact, approved by students of the subject[12] and by the Supreme Court[13] is to deal with problems which the courts are in a poor position to handle. The lengthy proceedings necessary adequately to present the facts in cases like the present, the unfamiliarity of the judges with the technical aspects of the question and the likelihood of prolonged litigation before final solution of the multifarious difficulties can be achieved, argue effectively for the compact method of adjustment as a substitute for judicial process. And the Supreme Court has held in suits involving problems analogous to the instant case that where one state has granted title to land, a subsequent compact determining that such land belongs to another state and invalidating titles granted by the first state is not an unlawful alteration of private rights, since no state has power to give title to property without its jurisdiction.[14] The same argument is equally applicable to disputed water rights. If, therefore, as was not denied, Colorado's citizens were adequately represented in the negotiations resulting in the compact here in question and their rights accorded due consideration,[15] the constitutional condition precedent to deprivation of property would seem clearly to have been satisfied.[16]

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11. *Cf.* Kansas v. Colorado, 185 U. S. 125 (1902); 206 U. S. 46 (1907); Wyoming v. Colorado, 259 U. S. 419, 496 (1922); 260 U. S. 1 (1922); 286 U. S. 494 (1932); Connecticut v. Massachusetts, 282 U. S. 660 (1931); New Jersey v. New York, 283 U. S. 336 (1931); Bannister, *Interstate Rights in Interstate Streams in the Arid West* (1923) 36 HARV. L. REV. 960.

12. *Cf.* Johnson, *Uniform Laws by Interstate Compact* (1908) OHIO STATE BAR ASSOCIATION REP. 174; WIGMORE, PROBLEMS OF LAW (1920) 126-135; Chamberlain, *Current Legislation* (1923) 9 A. B. A. J. 207; Frankfurter and Landis, *supra* note 3; Donovan, *State Compacts as a Method of Settling Problems Common to Several States* (1931) 80 U. OF PA. L. REV. 5; Note (1922) 35 HARV. L. REV. 322. But *cf.* Rogers, *Some Problems of the Interstate Water War* (1923) COLO. BAR ASSOCIATION REP. 107.

13. See Washington v. Oregon, 214 U. S. 205, 218 (1909); Minnesota v. Wisconsin, 252 U. S. 273, 283 (1920); New York v. New Jersey, 256 U. S. 296, 313 (1921).

14. Poole v. Fleeger, 36 U. S. 185 (1837); Coffee v. Groover, 123 U. S. 1 (1887); *cf.* Marlatt v. Silk, *supra* note 3; 2 WIEL, *op. cit. supra* note 6, § 1230, n. 14.

15. A convincing dissent declares: "If notice and a hearing were necessary to the validity of the compact—and they were not—the burden was upon the plaintiff to prove that there was no notice or hearing. No such proof or offer of such proof was made." *Supra* note 10, at 192. *Cf.* McSween v. Live Stock Sanitary Board of Florida, 97 Fla. 750, 775, 122 So. 239, 248 (1929), as to the necessity of notice for a legislative act.

16. As a result of the court's decision there arises the possibility of a suit by New Mexico to enforce its rights under the compact. *Cf.* Green v. Biddle, *supra* note 2; 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 21; 3 WILLOUGHBY, *op. cit. supra* note 2, § 875 *et seq.*; WARREN, *op. cit. supra* note 3, at 69 et seq. Interstate compacts have been held to be enforceable contracts. Green v. Biddle, *supra* note 2; *cf.* Fisher v. Cockerell, 30 U. S. 247 (1831); Hawkins v. Barney, 30 U. S. 456 (1831); Virginia v. West Virginia, 78 U. S. 39 (1870); Kentucky Union Co. v. Kentucky, 219 U. S. 140 (1911).

USE OF BONDHOLDERS' COMMITTEE TO AGGREGATE CLAIMS FOR FEDERAL JURISDICTION

THE requirement that suits brought in the federal District Courts must involve at least $3,000[1] cannot be satisfied by aggregating several smaller claims unless a bona fide transfer of the claims is made to a single individual.[2] And a bona fide transfer is one where there is an actual, not a nominal, transferee.[3] An agency relationship,[4] for example, or a transfer for collection only[5] is not such an assignment; consideration must pass from the assignee to the original holders, and a promise to pay over all or part of the proceeds resulting from collection of the claims is not considered adequate for this purpose.[6] Accordingly in suits by taxpayers to enjoin the collection of taxes federal jurisdiction is determined by the amount of interest of each complainant and not by the total of the claims.[7] Similarly a creditor's bill must usually involve $3,000 without aggregation with others,[8] and a stockholder's bill must ordinarily meet the jurisdictional amount as to each stockholder's claim.[9] These rules have been strictly observed; exception has been made only where the suit is to enforce a single title in which the claimants have a common and undivided interest.[10] Thus when a creditor sues on behalf of creditors similarly situated to enforce an assignment for the benefit of creditors or for the appointment of a receiver to

1. 36 STAT. 1091 (1911), 28 U. S. C. § 41 (1926).

2. Williams v. Nottawa, 104 U. S. 209 (1881); Bernards Township v. Stebbins, 109 U. S. 341 (1883).

3. Lake County Commissioners v. Dudley, 173 U. S. 243 (1899).

4. Woodside v. Beckham, 216 U. S. 117 (1910); Hartford Fire Insurance Co. v. Erie Rr. Co., 172 Fed. 899 (C. C. S. D. N. Y. 1909).

5. Waite v. Santa Cruz, 184 U. S. 302 (1902).

6. Farmington v. Pillsbury, 114 U. S. 138 (1885); Central Paper Co. v. Southwick, 56 F. (2d) 593 (C. C. A. 6th, 1932).

7. Woodmen of the World v. O'Neill, 266 U. S. 292 (1924); Elliott v. Board of Trustees, 53 F. (2d) 845 (C. C. A. 5th, 1931); Crawford County Trust and Savings Bank v. Crawford, 63 F. (2d) 342 (C. C. A. 8th, 1933), where plaintiffs as stockholders in a bank contested a tax on stock and an aggregation of their claims was denied. *Cf.* First National Bank of Woodbine v. Harrison County, 57 F. (2d) 56 (C. C. A. 8th, 1932), where the bank joined as party plaintiff in a similar action and because of a statute making the bank secondarily liable for such taxes jurisdiction was upheld.

8. Lion Bonding Co. v. Karatz, 262 U. S. 77 (1923); Indemnity Insurance Co. v. School District No. 1, 63 F. (2d) 878 (C. C. A. 6th, 1933).

9. Woods v. Thompson, 14 F. (2d) 951 (C. C. A. 7th, 1926); Haas v. Burton, 25 F. (2d) 938 (C. C. A. 5th, 1928); Ayer v. Kemper, 48 F. (2d) 11 (C. C. A. 2d, 1931). *Cf.* Cohn v. Cities Service Co., 45 F. (2d) 687 (C. C. A. 2d, 1930); General Finance Corporation v. Keystone Credit Corporation, 50 F. (2d) 872 (C. C. A. 4th, 1931).

10. 36 STAT. 1098 (1911), 28 U. S. C. 80 (1926). See BUNN, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES (3d ed. 1927) 44-46. The matter in controversy has been considered a common, undivided claim in the following cases: Kline v. Wright, 42 F. (2d) 927 (E. D. Idaho, 1930) (suit to adjudicate mining rights); Harvey v. American Coal Co., 50 F. (2d) 832 (C. C. A. 7th, 1931) (suit by several plaintiffs to restrain the use of a trade name); Dern v. Tanner, 60 F. (2d) 626 (D. Mont. 1932) (suit to adjudicate water priorities); New York Life Insurance Co. v. Jones, 2 F. Supp. 600 (N. D. N. C. 1933) (suit to cancel two life insurance policies contracted for by the same parties). *Cf.* Essman v. Hood, 45 F. (2d) 881 (N. D. Tex. 1930); Georgia Power Co. v. Hudson, 49 F. (2d) 66 (C. C. A. 4th, 1931).

marshall the debtor's assets,[11] or when a stockholder brings suit against the corporate management for breach of trust,[12] the jurisdiction of the court will not depend upon the amount of the plaintiff's individual interest. But in such case the question is not one of aggregation of separate claims; the measure of the jurisdictional requirement is the amount of the assets against which the suit is brought or the value of the object sought to be gained.

In a recent decision, however, the Supreme Court allowed a bondholders' committee to sue in the federal courts although the individual claims of all but three of the prior holders were insufficient to meet the jurisdictional requirement of $3,000.[13] The relationship between bondholders and a bondholders' protective committee is usually considered to be one of trust,[14] but the terms agency, bailment, assignment and power of attorney coupled with an interest have all been applied by the courts.[15] Under the protective agreement the committee takes legal but not beneficial title for the purpose of representing the bondholders. It would seem that the requirement of an actual, bona fide transfer could not thus be satisfied. The only consideration passing to the bondholders is a promise to pay over the proceeds, a promise which has heretofore been deemed inadequate. Nor is the suit against a fund wherein the plaintiffs have "a common and undivided interest"; the case is clearly one of aggregation of claims. Nevertheless the Court declared that because the principal aim of a bondholders' committee is not simply to resort to litigation but, primarily, to invest the trustees with full title and discretionary powers in order that they may conserve, salvage and adjust the investment,[16] the transfer to a protective committee should be distinguished from a mere transfer for collection and the prerequisite of federal jurisdiction regarded as satisfied.

The decision indicates, perhaps, a desire on the part of the Court to relax the strictness of the previous rule. Or it may be that the merits of the particular case were persuasive. In either event the decision affords bondholders whose individual claims would not be sufficient to permit suit in the federal courts a convenient means of circumventing the restriction. And since the rules as to diversity of citizenship are the same as those governing the requirement of jurisdictional amount,[17] the

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11. Putnam v. Timothy Dry Goods Co., 79 Fed. 454 (C. C. Tenn. 1897); Kelly v. Alabama-Quenelda Graphite Co., 34 F. (2d) 790 (N. D. Ala. 1929).

12. Brown v. Duffin, 13 F. (2d) 708 (C. C. A. 6th, 1926); Haynes v. Fraternal Aid Union, 34 F. (2d) 305 (D. Kan. 1929); Johnson v. Ingersoll, 63 F. (2d) 86 (C. C. A. 7th, 1933).

13. Bullard v. City of Cisco, 54 Sup. Ct. 177 (1933), *rev'g* 62 F. (2d) 313 (C. C. A 5th, 1932). Previously a dismissal by the District Court of a bill for the appointment of a receiver for the city had been upheld since the statute allowing such a receivership had been repealed. 48 F. (2d) 212 (C. C. A. 5th, 1931). For the advantages of resorting to federal courts in enforcing municipal bonds, see Comment (1933) 27 ILL. L. REV. 432.

14. Fuller v. Venable, 118 Fed. 543 (C. C. A. 4th, 1902); Habirshaw Electric Cable Co. v. Habirshaw Electric Co., 296 Fed. 875 (C. C. A. 2d, 1924); Parker v. New England Oil Corporation, 4 F. (2d) 392 (D. Mass. 1924), *rev'd* on other grounds, 19 F. (2d) 903 (C. C. A. 1st, 1927).

15. See Rohrlich, *Protective Committees* (1932) 80 U. OF PA. L. REV. 670, 682.

16. 19 FLETCHER, CORPORATIONS (Rev. ed. 1933) § 9318.

17. Lehigh Mining and Manufacturing Co. v. Kelly, 160 U. S. 327 (1895); Rojas-Adam Corporation v. Young, 13 F. (2d) 988 (C. C. A. 5th, 1926); Board of Education of Town of Carmen v. James, 49 F. (2d) 91 (C. C. A. 10th, 1931); Hollingsworth v. Multa Trina

device should be equally available to bondholders who could not themselves secure federal jurisdiction because they are citizens of the corporation's domiciliary state.

Recovery of Damages by Person Convicted Through Illegal Search

In a recent English case,[1] an official of a radical labor movement was arrested at the headquarters of the organization, which the police subjected to a thorough search, and from which they removed all the records, documents and papers which could be found. Most of these were on examination soon returned, but some were used as evidence in subsequent criminal proceedings, not against the person arrested at the time of the seizure but against another leader of the movement, who was ultimately convicted of incitement to sedition. He and other officials of the organization brought an action for damages against the police for the seizure and detention of the documents. The defendants asserted the legality of their conduct, claiming the search was properly "incidental to an arrest." The court awarded damages for the unlawful action of the police in removing the books and documents which were of no evidentiary value at the trial of the accused, but denied damages for the removal of those which were used at the trial, on the ground that the interest of the State in the preservation of evidence justified a seizure otherwise unlawful.

The demands of efficient criminal law administration have led to the retention of the common-law rule which permits an officer making a lawful arrest to search the person of the accused[2] and the immediate premises,[3] and to seize the instruments and evidences of the crime.[4] The search is considered lawful even if the articles seized are used to prove that the arrested person committed a crime other than the one for which he was taken in custody.[5] But limitations, designed to curb the indiscreet zeal of police officers, have been imposed upon the so-called "incidental" right of search. Thus the officers, having once left the premises at which the arrest is made, may not return to make a further search;[6] nor may they conduct a search elsewhere than at the place of arrest.[7] And where the arrest is made an occasion for a general exploratory search for evidences of law violations, the search is declared illegal.[8] To preserve

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Ditch Co., 51 F. (2d) 649 (C. C. A. 10th, 1931). If an assignor is unable to sue in his own name on a promissory note or other chose in action payable to bearer and not made by a corporation his assignee is not allowed to sue on the ground of diversity of citizenship even though a bona fide transfer has been made. 36 Stat. 1091 (1911), 28 U. S. C. § 41 (1926).

1. Elias v. Pasmore, 50 T. L. R. 196 (K. B. 1934).

2. United States v. Kraus, 270 Fed. 578, 582 (S. D. N. Y. 1921); State v. Hord, 329 Ill. 117, 160 N. E. 135 (1928); Biggs v. State, 201 Ind. 200, 167 N. E. 129 (1929).

3. Shelton v. United States, 50 F. (2d) 405 (C. C. A. 7th, 1931).

4. Estabrook v. United States, 28 F. (2d) 150, 153 (C. C. A. 8th, 1928); Argetakis v. State, 24 Ariz. 599, 608, 212 Pac. 372, 375 (1923); Commonwealth v. Phillips, 224 Ky. 117, 5 S. W. (2d) 887 (1928); People v. Chiagles, 237 N. Y. 193, 142 N. E. 583 (1923).

5. United States v. Murphy, 264 Fed. 842, 245 (E. D. N. Y. 1920); Haverstick v. State, 196 Ind. 145, 150, 147 N. E. 625, 627 (1925); see Goulded v. United Stats, 255 U. S. 298, 312 (1921). *Contra:* United States v. Boyd, 1 F. (2d) 1019 (W. D. Wash. 1924).

6. See Comment (1926) 35 Yale L. J. 612.

7. *Ibid.*; Agnello v. United States, 269 U. S. 20 (1925).

8. United States v. 1013 Crates of Whiskey Bottles, 52 F. (2d) 49 (C. C. A. 2d, 1931). Wholesale searches have been declared illgal particularly where papers and documnts have been seized. Go-Bart Importing Co. v. United States, 282 U. S. 344 (1931); United

the individual's constitutional immunity from unreasonable searches and seizures, the offending officer is made liable in damages to the injured person,[9] and, in the federal courts and in approximately half the state courts in which the question has been considered, the evidence unlawfully obtained may be excluded in subsequent criminal proceedings.[10] In the remaining state courts, however, such evidence is admitted despite its illegal source, and the injured individual is confined to a civil action for the recovery of damages.[11] But past experience casts doubt upon the efficacy of a suit for damages to assure redress to the individual, or to discourage unlawful searches in the future. Courts and juries are not disposed to render substantial verdicts in favor of even subsequently acquitted parties[12] unless personal injuries have been sustained or property has been destroyed;[13] and few victims will incur the expense of a lawsuit to recover merely nominal damages for injury to the feelings or violation of the right of privacy.[14] Moreover, where evidence illegally secured at the arrest of the person named in the warrant is used against a third party, it is unlikely that the latter would be allowed even nominal damages, on the ground that since he possessed no interest in the articles seized his constitutional rights were not invaded.[15]

In the principal case, since the plaintiff occupied the premises which were subjected to the search and possessed an interest in the articles seized, the court should have awarded damages for the removal of the documents used at the trial as well as those

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States v. Lefkowitz, 285 U. S. 452 (1932); United States v. Kirschenblatt, 16 F. (2d) 202 (C. C. A. 2d, 1926). Seizures have been declared lawful, however, where the papers are used to carry on the crime and may be seen without a search. Dillon v. O'Brien and Davis, 20 L. R. Ir. 300 (Ex. Div. 1887); Marron v. United States, 275 U. S. 192 (1927); United States v. Poller, 43 F. (2d) 911 (C. C. A. 2d, 1930); State v. Mausert, 88 N. J. L. 286, 95 Atl. 991 (1915). Cases which sustain a general search for documents and papers, Sayers v. United States, 2 F. (2d) 146 (C. C. A. 9th, 1924); Smith v. Jerome, 47 Misc. 22, 93 N. Y. Supp. 202 (Sup. Ct. 1905) constitute an unfortunate minority, or are clearly distinguishable on their unique facts. United States v. Brunett, 53 F. (2d) 219, 225, 226 (W. D. Mo. 1931).

9. CORNELIUS, SEARCH AND SEIZURE (2d ed. 1930) §§ 480, 482, 486.

10. *Id.* § 7 *et seq*; Weeks v. United States, 232 U. S. 383 (1914). The so-called federal rule of inadmissibility is approved in CHAFFEE, FREEDOM OF SPEECH (1920) 299 *et seq.*; Fraenkel, *Concerning Searches and Seizures* (1921) 34 HARV. L. REV. 361, 372; Atkinson, *Admissibility of Evidence Obtained Through Unreasonable Searches and Seizures* (1925) 25 COL. L. REV. 11.

11. People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926). The so-called non-federal rule of admissibility is approved in 4 WIGMORE, EVIDENCE (2d ed. 1923) § 2184; Harno, *Evidence Obtained by Illegal Search and Seizure* (1925) 19 ILL. L. REV. 303.

12. And there is even less likelihood that those who are convicted on the basis of evidence illegally obtained will be awarded damages for the illegal action of police officials. *Cf.* Banfill v. Byrd, 122 Miss. 288, 84 So. 227 (1920), where the jury refused to follow the trial judge's peremptory instructions to render a verdict for the plaintiff in view of her bad reputation.

13. See, e.g., American Guaranty Co. v. McNiece, 111 Ohio St. 532, 146 N. E. 77 (1924); Boyd v. Genitempo, 260 S. W. 934 (Tex. Civ. App. 1924).

14. See, e. g., Caffinni v. Herman, 112 Me. 282, 91 Atl. 1009 (1914), and Regan v. Harkey, 40 Tex. Civ. App. 16, 87 S. W. 1164 (1905), in each of which a verdict for $200 was rendered.

15. See CORNELIUS, *op. cit. supra* note 9, § 14.

found to be of no evidentiary value.[16] A denial of liability for a seizure otherwise unlawful merely because the evidence thus obtained is used in a subsequent prosecution amounts to an open sanction for the acquisition of evidence by illegal searches. The practical result of this decision is to empower the police, in dealing with an unpopular organization, to conduct a wholesale search of its headquarters in connection with the arrest of a single member and, with the documentary evidence thus obtained, to convict the leaders at the cost of a few pounds' damage. And since a prospective liability for damages has no in terrorem effect upon overzealous police officials, the result of the instant case would follow in this country, despite constitutional safeguards, in those jurisdictions which admit evidence procured through an illegal search and seizure. It would seem, therefore, that the only effective guaranty against similar police activity in the future is to exclude the evidence.[17] The rule of inadmissibility of illegally obtained evidence, applied in favor of individuals arrested at the time of the search, should, in view of the policy behind the rule, be extended to situations where, as in the instant case, the conviction of a third person is sought on the basis of such evidence.

CHANGES IN THE FEDERAL RULES OF EVIDENCE IN CRIMINAL TRIALS

Two decisions of the Supreme Court at the present term have made important changes in the federal law as to the capacity of witnesses and the admissibility of testimony in criminal trials. Prior to these decisions the general rule was that in criminal actions the federal courts must adopt the laws of evidence which were in force in their respective states in 1789 or, if the state was not then a member of the Union, the law in force at the time of its admission.[1] The rule, it is true, had not been consistently followed with regard to the capacity as witnesses of those previously convicted of crime.[2] But the disability of one spouse as a witness for or against the other, a rule which has long been abolished by statute in England[3] and in most states,[4] had been uniformly preserved as it existed at the time of admission of the

16. In the instant case, of course, the English rule awarding attorneys' fees as an element of costs partially takes the place of a larger award of damages.

17. See note 10, *supra*. But see Fraenkel, *Recent Developments in the Law of Search and Seizure* (1928) 13 MINN. L. REV. 1, 9.

1. Logan v. United States, 144 U. S. 263 (1892); Olmstead v. United States, 277 U. S. 438 (1928).

2. Benson v. United States, 146 U. S. 325 (1892); Rosen v. United States, 245 U. S. 467 (1918). For a discussion of the difficulties involved in attempting a reconciliation of these cases with those cited in note 1, *supra*, see Leach, *State Laws of Evidence in the Federal Courts* (1930) 43 HARV. L. REV. 554. *Sweeney, Federal or State Rules of Evidence in Federal Courts* (1932) 27 ILL. L. REV. 394 contains a tabulation of the cases in the lower federal courts which illustrates the confusion caused by the conflicting holdings of the Supreme Court.

3. The disability was removed as to both spouses by 61 & 62 VICT. c. 36, § 1 (1898). The disability had been removed in civil cases by 32 & 33 VICT. c. 68, § 3 (1869). See 1 WIGMORE, EVIDENCE (2d ed. 1923) § 602.

4. See 1 WIGMORE, *op. cit. supra* note 3, § 488.

various states.[5] In *Funk v. United States*,[6] however, the Court, two justices dissenting, reversed a judgment excluding the favorable testimony of the wife of the accused and declared that the rules of evidence in criminal trials in the federal courts should hereafter be governed by "present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past."

Shortly after the decision in the *Funk* case the Court found occasion to explain and expand this rule. In *Wolfle v. United States*[7] the prosecution had been permitted at the trial to introduce the contents of a letter from the accused to his wife through the testimony of a stenographer to whom the accused had dictated the letter. The resulting conviction was affirmed by the Circuit Court of Appeals[8] on the ground that such testimony would have been admissible by statute in the courts of the state at the time of its admission to the Union. But the Supreme Court, although it sustained the conviction, specifically rejected the grounds adopted by the Court of Appeals and declared that "common law principles as interpreted and applied by the federal courts in the light of reason and experience" should be the determinants of the admissibility of testimony as well as of the competency of witnesses.

While the outcome of both cases is clearly desirable, the decisions suggest the inquiry whether it would not have been more expedient for the Court to have reversed its decision in *United States v. Reid*[9] and to have reinterpreted Section 34 of the Judiciary Act of 1789,[10] whereby the federal courts are authorized to adopt the rules of evidence current in their state courts "in trials at common law," to apply to criminal actions.[11] The instant decisions offer to the federal courts as guides for their determinations only "the light of general authority and sound reason."[12] Although in specific trials this principle may operate to admit serviceable testimony which might be excluded under existing local rules, the door is opened for time-consuming appeals in any case where a party may find advantage in urging that the admission or rejection of testimony fails to accord with general authority.[13] A new body of appellate decisions will thus be required to delimit the rule's application.

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5. Hendrix v. United States, 219 U. S. 79 (1911); *cf.* Benson v. United States, *supra* note 2. The language in Jin Fuey Moy v. United States, 254 U. S. 189, 195 (1920), would indicate that the common-law rule as it existed in 1789 controls the admissibility of a wife's testimony in criminal trials in all the federal courts. But this case was not followed in United States v. Rendleman, 18 F. (2d) 27 (C. C. A. 9th, 1927), in which the testimony of a wife had been admitted on the ground that this was permitted by the controlling law, namely, that in force in the Washington courts at the time of the admission of that state to the Union. See also Fitter v. United States, 258 Fed. 567, 576 (C. C. A. 2d, 1919); Tinsley v. United States, 43 F. (2d) 890, 895 (C. C. A. 8th, 1930).

6. 54 Sup. Ct. 212 (1933); noted in (1934) 28 ILL. L. REV. 486 and (1934) 82 U. OF PA. L. REV. 406. The trial was had in the District Court for the Middle District of North Carolina. By statute of that state the testimony of a wife was admissible in all trials. N. C. CODE ANN. (Michie, 1931) § 1802.

7. 54 Sup. Ct. 279 (1934).

8. Wolfle v. United States, 64 F. (2d) 566 (C. C. A. 9th, 1933).

9. 12 How. 361 (U. S. 1851); *cf.* Jin Fuey Moy v. United States, *supra* note 5.

10. 1 STAT. 92 (1789), 28 U. S. C. § 725 (1926).

11. See 1 WIGMORE, *op. cit. supra* note 3, § 6.

12. See Benson v. United States, *supra* note 2, at 335.

13. For an argument that "general law" exists only as it may be found in the statutes and decisions of a particular jurisdiction, see dissent of Holmes, J. in Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U. S. 518, 532 (1928).

These cases do indicate, however, that the Court is no longer in favor of a doctrine which has kept federal rules of evidence out of touch with modern trends. And it is to be hoped that as a result Congress will at last see fit to amend the Judiciary Act specifically to provide that current state rules of evidence should apply in criminal as well as in civil actions. The Court conceded in the instant decisions that state laws as they are now formulated accord on the whole with its notions as to the basis of admissibility best adapted to the ascertainment of the truth. Those rules, moreover, are familiar to the bar practicing before the federal courts and a body of appellate court decisions interpreting the statutory provisions is already in existence. By carrying them over into federal practice the laborious process of creating a separate federal law of evidence would be avoided, with the uncertainty inevitably attendant during the period of its development.

Power of Domiciliary State to Tax Income Derived from Foreign Real Estate

In computing the income upon which plaintiff, a resident of New York, was subject to a state income tax, New York tax officials in 1929 included rents from real estate in Ohio and profits from sale of a portion of that land. Plaintiff, apparently relying on cases holding that real property situate without the state is not subject to a property[1] or an inheritance[2] tax by the state of domicil, contested the tax. The Appellate Division, accepting plaintiff's analogy, disapproved the tax on rents from the Ohio land but upheld it on profits derived from the sale of the land, on the theory that such profits, the result of a capital investment, were sufficiently divorced from the land itself to be taxable by New York.[3] On appeal from the decision regarding rentals the Court of Appeals affirmed without opinion.[4]

The question of the power of states of domicil and of situs to impose taxes upon an individual's income, considered thus far by only a few courts, will acquire added importance as the adoption of personal income tax laws by more of the states subjects taxpayers with increasing frequency to unreasonable tax burdens.[5] In a few states the legislatures themselves have already recognized the necessity for restrictions upon the scope of income taxes. Thus, some statutes tax residents only on income arising within the state,[6] or, on the other hand, impose no tax whatever on

1. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194 (1905).
2. Frick v. Pennsylvania, 268 U. S. 473 (1925).
3. Pierson v. Lynch, 237 App. Div. 763, 263 N. Y. Supp. 259 (3d Dep't 1933).
4. People *ex rel.* Pierson v. Lynch, 263 N. Y. 19 (1933).
5. The following states now tax residents on their entire income and non-residents on income the source of which is within the state. Ark. Stat. (Castle, Supp. 1931) § 10240d; Idaho Code Ann. (1932) §§ 61-2410, 61-2416, as amended by Idaho Laws 1933, c. 159, pp. 245, 252; Mass. Ann. Laws (1932) c. 62; Miss. Code Ann. (1930) § 5027; Mo. Stat. Ann. (1929) § 10115; N. C. Rev. Acts (1931) § 7880 (127); N. D. Comp. Laws Ann. (Supp. 1925) § 2346a, as amended by N. D. Laws 1933, c. 252; Ore. Laws 1933, c. 322, § 69-1503; S. C. Code (1932) § 2437, as amended by S. C. Acts 1933, no. 406; Tenn. Code (1932) § 1090; Vt. Laws 1931, Act. 17; Va. Tax Code (1930) c. 6; Wis. Stat. (1931) § 71.01. For a discussion of rates see Green, The Theory and Practice of Modern Taxation (1933).
6. Hawaii Laws 1932, p. 146, followed in Hill v. Carter, 47 F. (2d) 869 (C. C. A. 9th, 1931); Okla. Laws 1933, c. 195, § 6.

non-residents;[7] and two states, following the example of the federal government's treatment of international double taxation,[8] permit deduction of taxes paid to other states on the same income.[9] In the absence of such self-imposed legislative restrictions, a similar result may be effected by the state courts.[10] Thus, the New York court in the principal case denied the domiciliary state's jurisdiction to tax income from realty located elsewhere; the New Hampshire court has approved a similar conclusion with respect to tangible personal property;[11] and Massachusetts has refused to tax a resident trustee because the cestui was domiciled in and had been taxed by another state.[12]

But such limitations, imposed by the states upon themselves, will not prove an effective cure for multi-state taxation when the restrictions imposed by different states still allow overlapping taxation of the same income. A taxpayer whose income has its source in a foreign state will not benefit from the domiciliary state's failure to tax non-residents on income earned within the state, nor from the refusal of the state where income was earned to tax residents on income earned without the state. Moreover, it is hardly to be anticipated that all states will, either legislatively or judicially, admit restrictions upon their own income taxes. As in the case of inheritance taxes,[13] the Supreme Court will thus undoubtedly be asked to determine proper limitations upon the power of the states to tax various kinds of income, and to apply these limitations uniformly to all states.

The Supreme Court has already held, in separate cases, that income may be taxed

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7. N. H. PUB. LAWS (1926) c. 65, §§ 2, 3, 10. Delaware and Utah limit the tax on non-residents to income derived from trusts located in the state. Del. Laws 1929, c. 8, §§ 2, 5; Utah Laws 1931, c. 44, §§ 3, 47.

8. 47 STAT. 211 (1932), 26 U. S. C. SUPP. VI § 131 (a) (1) (1932).

9. Ga. Laws 1931 (Extra Sess.), Act 13, § 14 (a); N. Y. TAX LAW (1930) § 351.

10. The majority of state decisions, however, have as yet placed no restrictions on the possibility of multi-state income taxation. Longyear v. Commissioner, 265 Mass. 585, 164 N. E. 459 (1929); People v. State Tax Commissioner, 218 App. Div. 1, 217 N. Y. Supp. 669 (3d Dep't 1926); Crescent Manufacturing Co. v. Tax Commission, 129 S. C. 480, 124 S. E. 761 (1924).

11. Opinion of the Justices, 84 N. H. 559, 149 Atl. 321 (1930). A state may not tax income from non-local sources earned before the taxpayer became a resident of the taxing state. Hart v. Tax Commissioner, 240 Mass. 37, 132 N. E. 621 (1921). See Standard Oil Co. v. Thoresen, 29 F. (2d) 708 (C. C. A. 8th, 1928), and Standard Oil Co. v. Wisconsin Tax Commission, 197 Wis. 630, 223 N. W. 85 (1929), disapproving a corporation income tax on income from operations conducted without the state.

12. Hutchins v. Commissioner, 272 Mass. 422, 172 N. E. 605 (1930), noted in (1931) 31 COL. L. REV. 173; State v. Hampel, 172 Wis. 67, 178 N. W. 244 (1920). Usually the beneficiary and trustee of a trust may both be taxed by their respective domiciliary states. Rowe v. Braden, 186 N. E. 20 (Ohio Ct. of App. 1932); Ross v. McCabe, 61 S. W. (2d) 479 (Tenn. 1933); Wisconsin Trust Co. v. Widule, 164 Wis. 56, 159 N. W. 630 (1916); *cf.* Bank of Commerce and Trust Co. v. McCabe, 164 Tenn. 591, 51 S. W. (2d) 850 (1932), holding that a non-resident beneficiary of a trust may not be taxed even though the trust and trustee are within the state. For a general discussion of all these cases, see Rottschaefer, *State Jurisdiction of Income* (1931) 44 HARV. L. REV. 1075.

13. Frick v. Pennsylvania, *supra* note 2; Blodgett v. Silberman, 277 U. S. 1 (1928); Farmers Loan and Trust Co. v. Minnesota, 280 U. S. 204 (1930); Baldwin v. Missouri, 281 U. S. 586 (1930); First National Bank v. Maine, 284 U. S. 312 (1932).

both by the state of residence[14] and by the state where the income is earned.[15] But these holdings do not indicate that the Court will approve actual "double" taxation of the same income, for in neither of them had the second state attempted to impose a tax. On the contrary, the position which the Court has taken in recent years in cases dealing with inheritance taxation[16] suggests that it disapproves of imposition by different states of similar taxes upon the same interests in property,[17] and that only one state will be granted the power to tax a given income. The decision as to which state may tax will undoubtedly vary according to the facts presented by the case in dispute. It can hardly be doubted that the Supreme Court, should the issue arise, will agree with the decision of the New York court in the principal case that only the state where land is situated may tax rent accruing from it, on the theory that land is only taxable at its situs[18] and that rent, considered in law as a real property interest, is so close to the land as to partake of its immunity from foreign taxation.[19] From a logical standpoint it would seem that profits from the sale of foreign realty, held taxable by the state of domicil in the instant case, pertain as closely to the land in their source as does income from continuing use of the land. Certainly the exercise in New York of business acumen in securing the sales profits, stressed by the lower New York court in justification of the tax thereon, was equally essential in securing income from the rental of the same realty. But the fact that when the land is disposed of the sales price probably enters the hazy realm of completely intangible property interests, in the form of a note or a credit against a bank, would probably impress the Supreme Court, as it did the state court, with the practicability of attaching that intangible interest to the person of the creditor for taxation purposes. Thus the question raised by the second half of the instant decision points the way to future disputes over multi-state taxation of different types of income, which the Supreme Court will be forced to resolve in the light of practical rather than strictly logical considerations.[20]

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14. Maguire v. Trefry, 253 U. S. 12 (1920); Lawrence v. Mississippi, 286 U. S. 276 (1932), *aff'g* 162 Miss. 338, 137 So. 503 (1931), noted in (1932) 42 YALE L. J. 283.

15. Shaffer v. Carter, 252 U. S. 37 (1920); Travis v. Yale & Towne Manufacturing Co., 252 U. S. 60 (1920). The federal tax may be imposed on alien non-residents on income derived from within the United States. DeGanay v. Lederer, 250 U. S. 376 (1918).

16. See cases note 13, *supra.*

17. Beidler v. South Carolina Tax Commission, 282 U. S. 1 (1930).

18. Union Refrigerator Transit Co. v. Kentucky, *supra* note 1.

19. Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429, 581 (1895); Opinion of the Justices, 220 Mass. 613, 624, 108 N. E. 570, 574 (1915); Redfield v. Fisher, 135 Ore. 180, 292 Pac. 813 (1930).

20. For a further discussion of these issues, see HARDING, DOUBLE TAXATION OF PROPERTY AND INCOME (1933); Kessler, *Some Legal Problems in State Personal Income Taxation* (1925) 34 YALE L. J. 759; Day, *The Taxable Situs of Income* (1932) 8 CORN. L. Q. 36; Maguire, *Relief from Double Taxation of Personal Incomes* (1923) 32 YALE L. J. 757.